

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

* * *

Marina District Development Company,
LLC,

Case No. 2:20-cv-01592-GMN-BNW

Plaintiff.

ORDER

V.

AC Ocean Walk, LLC, et al.,

Defendants.

On November 5, 2020, the court denied Plaintiff's motion to seal the declarations of James Bruno and Hugh Turner in support of its motion for a temporary restraining order and injunctive relief (ECF No. 11) but allowed it to re-file its request. Those declarations are currently filed under seal under at ECF Nos. 12 and 13. Plaintiff filed its renewed motion (ECF No. 137) and now seeks to file a redacted version of those declarations, which are at ECF Nos. 137-1 and 137-2. Defendants oppose the renewed request, and the opposition is currently filed under seal at ECF No. 144. Plaintiff replied at ECF No. 146. The court finds that Plaintiff has overcome the prior deficiencies and that compelling reasons exist to redact the names and associated gambling-related information of Plaintiff's customers. As a result, and as explained below, the court will grant Plaintiff's motion at ECF No. 137.

24 Defendants Callahan and Burke filed a motion requesting, out of an abundance of caution,
25 leave to file their opposition to Plaintiff's motion at ECF No. 137 under seal. ECF No. 145.¹ The
26 sealed opposition is at ECF No. 144. Defendants Callahan and Burke do not believe there is a

¹ The court realizes that this motion is not ripe. Nevertheless, given the arguments already presented and the analysis in this Order, no additional briefing is needed.

1 need for this information to be sealed. For the reasons explained below, the court grants in part
 2 and denies in part ECF No. 145 and orders Defendants to redact the names and gambling-related
 3 information contained in their sealed opposition (currently filed as ECF No. 144).

4 Lastly, Defendants filed a motion, also out of an abundance of caution, seeking leave to
 5 file a supplement to ECF No. 51 under seal (ECF No. 115).² The supplement is currently filed
 6 under seal at ECF No. 114. Defendants do not believe that there is a need for this information to
 7 be sealed. For the reasons explained below, the court grants in part and denies in part ECF No.
 8 115 and orders Defendants to redact the names and gambling-related information contained in
 9 their sealed supplement (currently filed as ECF No. 114).

10 **I. Plaintiff's motion to redact the declarations of James Bruno and Hugh Turner (ECF No.**
 11 **137)**

12 **A. Is Plaintiff's motion to seal moot?**

13 Defendants cite to *F.T.C. v. AMG Servs., Inc.*, No. 2:12-CV-536-GMN-VCF, 2012 WL
 14 3562027 (D. Nev. Aug. 15, 2012) for the proposition that Plaintiff cannot meet the compelling
 15 reasons standard to maintain these declarations under seal, given Plaintiff already made these
 16 names public during the preliminary injunction hearing before the district court. The court agrees
 17 with Plaintiff that the court in *FTC v. AMG Servs.* denied the motion to seal on the grounds that
 18 the information sought to be sealed was general in nature—and not on the grounds that the
 19 information had already been made public. Defendants do not provide any other authority for the
 20 proposition that Plaintiff's mention of these clients during the preliminary injunction hearing
 21 automatically moots this request. The court, therefore, declines to dispose of this motion on these
 22 grounds, although, as discussed below, this is a relevant factor in the substantive analysis.

23 **B. Does the “Law of the Case” doctrine require this court to grant Plaintiff's request?**

24 Plaintiff argues that the district court's ruling at ECF Nos. 88 and 89 (allowing Plaintiff to
 25 seal the names of customers and any other trade secret information) has become the law of the
 26 case. As such, Plaintiff argues this court is bound to apply that same holding to the instant
 27 motion. Defendants first cite to *Center for Biological Diversity v. Salazar*, 706 F.3d 1085, 1090

28 ² ECF No. 51 is Defendants' opposition to Plaintiff's request at ECF No. 11 to seal the declarations in question.

1 (9th Cir. 2013), and argue that the law of the case doctrine does not apply at the preliminary
 2 injunction phase. Next, Defendants argue that the issue in question was not explicitly decided or
 3 necessarily implied by the district court’s prior ruling, as required by *United States v. Jingles*, 702
 4 F3d 494, 499 (9th Cir. 2012). As such, according to Defendants, the law of the case doctrine is
 5 inapplicable.

6 “Issues that a district court determines during pretrial motions become law of the case.”
 7 *United States v. Phillips*, 367 F.3d 846, 856 (9th Cir. 2004) (citation omitted). “Under the ‘law of
 8 the case’ doctrine, a court is ordinarily precluded from reexamining an issue previously decided
 9 by the same court, or a higher court, in the same case.” *United States v. Jingles*, 702 F.3d 494,
 10 499 (9th Cir. 2012) (*quoting Richardson v. United States*, 841 F.2d 993, 996 (9th Cir. 1988)).
 11 “For the doctrine to apply, the issue in question must have been decided explicitly or by necessary
 12 implication in [the] previous disposition.” *Id.* at 499–500 (*quoting United States v. Lummi Indian*
 13 *Tribe*, 235 F.3d 443, 452 (9th Cir. 2000)). A court has discretion to depart from the law of the
 14 case, however, where: 1) the first decision was clearly erroneous; 2) an intervening change in the
 15 law has occurred; 3) the evidence on remand is substantially different; 4) other changed
 16 circumstances exist; or 5) a manifest injustice would otherwise result. Failure to apply the
 17 doctrine of the law of the case absent one of the requisite conditions constitutes an abuse of
 18 discretion. *Thomas v. Bible*, 983 F.2d 983, 155 (9th Cir. 1993).

19 Both of Defendants’ arguments fail. First, the court agrees with Plaintiff that *Salazar* is
 20 not applicable. In that case, the Ninth Circuit had to decide whether a *prior* Ninth Circuit panel
 21 that affirmed the district court’s denial of appellants’ preliminary injunction motion became the
 22 law of the case as to certain issues intertwined with the preliminary injunction. *Salazar*, 706 F.3d
 23 at 1090. The Ninth Circuit explained that *its* “decisions at the preliminary injunction phase do not
 24 constitute the law of the case” because “decisions on preliminary injunctions . . . must often be
 25 made hastily and on less than a full record.” *Id.* (*quoting S. Or. Barter Fair v. Jackson Cnty.*, 372
 26 F.3d 1128, 1136 (9th Cir.2004)).

27 The procedural posture of this case is entirely different from that in *Salazar*. Here,
 28 Plaintiff argues the law of the case doctrine applies given the district court’s prior ruling on a

1 *sealing matter* where Plaintiff sought the same relief sought in the instant motion: to maintain
 2 trade secrets, including customer names, under seal. There is no question that the district court
 3 granted Plaintiff's motion (ECF No. 88) to maintain "names and any other trade secret
 4 information that the parties stipulate to" under seal (in the sense that they could be redacted).³
 5 ECF No. 96 at 68. Thus, the court finds that reaching a different result would be an abuse of
 6 discretion as it would be "reexamining an issue previously decided by the same court, or a higher
 7 court, in the same case." *Jingles*, 702 F.3d at 499.

8 Next, the issue in question was indeed "decided or necessarily implied" by the district
 9 court's prior ruling. *Id.* As mentioned above, the issue is the same one: whether trade secrets,
 10 including customer names, should remain sealed. It is routine in this (and most other districts) for
 11 district judges to refer certain motions to the magistrate judge for orders or reports and
 12 recommendations. The fact that the district judge referred the instant motion to the undersigned
 13 magistrate judge simply means that the magistrate judge was assigned to resolve the issue—but it
 14 does not in any way change the fact that the law of the case would, absent an applicable
 15 exception, preclude this court from arriving at a different result. No exception was argued by
 16 Defendants and the court does not find any would apply.

17 C. Has Plaintiff met the compelling reason standard?

18 Even if the law of the case doctrine did not apply, this court would still conclude that the
 19 compelling reason standard has now been met. Plaintiff's prior motion to seal at ECF No. 11
 20 provided a one line justification for sealing, which this court found was insufficient. In addition,
 21 Plaintiff previously argued—incorrectly—that this court should apply the "good cause" standard.
 22 The current request applies the correct standard and provides a sufficient factual basis for the
 23 requested redactions such that this court would not need to rely on hypothesis or conjecture.

24 There is a strong presumption of public access to judicial records. See *Kamakana v. City*
 25 & *City of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006). When a party seeks to seal documents
 26 submitted in conjunction with a dispositive motion such as a preliminary injunction, the party

27 ³ The district court also acknowledged that the parties would not stipulate to maintain the names of these customers
 28 under seal, but she would allow for the names to remain sealed. ECF No. 96 at 68.

1 must show a “compelling reason” exists to seal or redact the documents. *Oliner v. Kontrabecki*,
 2 745 F.3d 1024, 1025-26 (9th Cir. 2014) (*citing Pintos v. Pac. Creditors Ass ’n*, 605 F.3d 665, 677-
 3 78 (9th Cir. 2010)). “Generally speaking, compelling reasons exist when court records ‘might
 4 have become a vehicle for improper purposes,’ such as to gratify private spite, promote public
 5 scandal, commit libel, or release trade secrets.” *In re Roman Catholic Archbishop of Portland in
 6 Or.*, 661 F.3d 417, 429 (9th Cir. 2011) (*citing Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589,
 7 598 (1978)).

8 When applying the compelling reasons standard, “a district court must weigh relevant
 9 factors, base its decision on a compelling reason, and articulate the factual basis for its ruling,
 10 without relying on hypothesis or conjecture.” *Pintos*, 605 F.3d at 679. In essence, the court must
 11 “balance the competing interests of the public and the party seeking to seal judicial records.”
 12 *Kamakana*, 447 F.3d at 1179. “Relevant factors” include, but are not limited to, the “public
 13 interest in understanding the judicial process and whether disclosure of the material could result
 14 in improper use of the material for scandalous or libelous purposes or infringement upon trade
 15 secrets.” *Pintos*, 605 F.3d at 679.

16 A “trade secret may consist of any formula, pattern, device or compilation of information
 17 which is used in one’s business, and which gives him an opportunity to obtain an advantage over
 18 competitors who do not know or use it.” *In re Elec. Arts, Inc.*, 298 F. App’x 568, 569 (9th Cir.
 19 2008) (*quoting Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 598 (1978)); *see also Restatement*
 20 *of Torts* § 757, cmt. b.

21 Starting with Mr. Bruno’s declaration, Paragraphs 5 through 11 identify the names of
 22 three of Borgata’s high-level customers. ECF No. 137-1. Paragraph 5 identifies the customers’
 23 gaming preferences (including dates of visits to Borgata) and value and revenue to Borgata. *Id.*
 24 Paragraph 6 identifies the customers’ names and which hotel room they were located in on a
 25 specific date, which provides information about their accommodations. *Id.* Paragraphs 7, 8, and 9
 26 identify the customer’s name and in Paragraph 9, the specific date of the customer’s gaming is
 27 provided. *Id.* Paragraph 10 identifies the name of a customer, the date the customer was gaming,
 28 and information regarding the value and revenue that customer provides to Borgata. *Id.* Paragraph

1 11 identifies the customer's name, the date of the customer's last visit to Borgata, the nature and
2 amount of certain incentives offered to the customer by Borgata, and information concerning the
3 customer's gaming wins and/or losses. *Id.*

4 As to Mr. Turner's declaration, Paragraph 9 identifies the name of a Borgata customer and
5 private information about the customer's travel history and preferences. ECF No. 137-2.
6 Paragraph 11 contains the name of a customer, the value and revenue of the customer to Borgata,
7 and private information about the customer's travel history and preferences. *Id.* Paragraphs 12
8 through 15 contain the names of several Borgata customers and the revenue those customers
9 represent to Borgata. *Id.* Attached to Mr. Turner's declaration (see Exhibit A thereto) is an
10 excerpt of Defendant Callahan's Borgata cellphone records showing his calls to certain Borgata
11 customers referenced in Mr. Turner's declaration.

12 The court finds that the customer names and related information that appear in these
13 declarations and attachments qualify as trade secrets. It constitutes information that provides
14 Plaintiff an advantage over competitors who are not aware of the information. The court is not
15 persuaded by Defendants' argument to the contrary. Here, Plaintiff seeks to redact not just the
16 names of these customers (which arguably would still qualify as a trade secret given the way in
17 which the information could be used by competitors), but information associated with their
18 gambling habits and incentives for gambling where they do.

19 The court also considered the fact that Plaintiff has named these individuals during a
20 public hearing. This is certainly a fact that cuts against Plaintiff in the analysis, as Plaintiff did not
21 exercise the degree of discretion it now asks the court to in seeking to seal these documents. The
22 court considers that Plaintiff's mention of certain names was in the context of arguing for a
23 preliminary injunction and the fact that failing to redact these names would provide additional
24 access to this information. At bottom, the court construes Plaintiff's request as one not to further
25 expose this information and, on balance, finds that compelling reasons still exist to redact this
26 information.

27 Plaintiff explains that the customer information has been compiled by Borgata throughout
28 the course of its relationships with its customers, how competitors could use it to lure Borgata's

1 customers away if this information were publicly identified, and how it would allow competitors
 2 to gain an unfair advantage. Given the nature of the business, the court finds this is a sufficient
 3 factual basis upon which to seal the information.⁴

4 Further, the redactions the court is allowing are narrowly tailored to protect only
 5 information that constitutes Plaintiff's trade secrets: identities of its customers, their gaming,
 6 travel and accommodation preferences, their gaming history in terms of month(s) and day(s) of
 7 their visits to Borgata, the customer's value and revenue to the Borgata, and the complementary
 8 and incentive items given to the customers by Borgata. These redactions do not prevent the public
 9 from understanding the judicial process. That is, the specific names of Borgata's customers and
 10 related information are not relevant to whether or not issuance of the preliminary injunction is
 11 warranted.

12 Because the court finds that the compelling reason standard is met under *Kamakana* and
 13 its progeny, it does not reach any other arguments made by Plaintiff in support of the requested
 14 redactions.

15 **II. Defendants' motions to seal (ECF Nos. 115 and 145)**

16 The court adopts the same analysis as it did above as to Defendants' motions at ECF Nos.
 17 114 and 145.

18 **IT IS ORDERED** that Plaintiff's motion at ECF No. 137 is GRANTED. Plaintiff shall
 19 file a notice entitled "Redacted declarations of James Bruno and Hugh Turner in support of
 20 Plaintiff's Motion for Temporary Restraining Order and Injunctive Relief replacing ECF Nos. 12
 21 and 13" and include the proposed redactions contained in ECF Nos. 137-1 and 137-2. Plaintiff
 22 must also include a redacted version of the call log in ECF 13-1.

23 ⁴ While Defendants argue that these individuals could be identified while they are gambling on a populated casino
 24 floor, based on the amounts these individuals gamble it seems unlikely that Plaintiff would not take precautions in
 25 that regard. Where they gamble and the extent to which they could be identified is conjecture and ultimately does not
 weigh in favor of not redacting the information.

26 The court also acknowledges Defendants' argument that Plaintiff may have another underlying motivation to redact
 27 this information. Yet, the court cannot make decisions based on parties' speculations as to what may motivate each
 28 request. The court makes its decision based on the application of the law to the stated facts (unless there is reason to
 question the facts). The court does not question the facts in this case; the failure to redact the information at issue
 would ultimately harm Plaintiff. Thus, as it applies to this case, any other motivation behind this request would not be
 part of the analysis.

1 **IT IS FURTHER ORDERED** that Defendant's Motion at ECF No. 145 is GRANTED
2 IN PART and DENIED IN PART. The court orders Defendants to redact the names and
3 gambling-related information contained in its sealed opposition (currently filed as ECF No. 144)
4 and file this redacted document with the title "Notice of redacted opposition to ECF No. 137
5 replacing the sealed opposition at ECF No. 144."

6 **IT IS FURTHER ORDERED** that Defendant's Motion at ECF No. 115 is GRANTED
7 IN PART and DENIED IN PART. The court orders Defendants to redact the names and
8 gambling-related information contained in its sealed supplement (currently filed as ECF No. 114)
9 and file this redacted document with the title "Notice of redacted supplement to ECF No. 51
10 replacing the sealed supplement at ECF No. 114."

11 DATED: January 11, 2021



BRENDA WEKSLER
UNITED STATES MAGISTRATE JUDGE

12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28